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ABSTRACT

This document is a discussion of civil and canon law as they apply to directors of religious education and youth ministers working in the Catholic Church. Courts no longer exercise judicial restraint with regard to matters of religion as they did before 1960; nor does the doctrine of charitable immunity still protect churches and other charitable organizations from liability for their negligent acts. The book presents the following: (1) "Civil Law Considerations for Parish Programs"; (2) "Tort Law: Some Responsibilities and Liabilities"; (3) "Considerations Regarding Canon Law and Governance"; (4) "Directors, Staff, and Volunteers: Rights and Duties"; and (5) "Some Key Questions and Concerns." A bibliography of 26 books, case citations, and other works is attached. (LBG)

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A Primer on Law for DREs and Youth Ministers

by Mary Angela Shaughnessy, SCN

National Association of Parish Coordinators/DREs
Department of Religious Education
National Catholic Educational Association

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DEDICATION

I dedicate this work, with
gratitude and affection, to
Miriam Corcoran, SCN, Ph.D.,
faithful religious woman,
excellent educator, and true
friend.

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Most especially, I thank you the readers. May you be richly blessed in your ministry.

Mary Angela Shaughnessy, SCN, Ph.D.
Louisville, Kentucky
March, 1992

Chapter One

Civil Law Considerations for Parish Programs

As the twentieth century closes, the Catholic Church and its religious education and youth ministry programs prepare for new challenges. The law is one area of great complexity. While the law relating to public institutions has been established for many years, law concerning religious institutions has emerged as its own area of the law only within the last decade or so.

Before the 1960s courts were reluctant to intervene in education cases, particularly those involving churches or other religious organizations. Practicing the doctrine of judicial restraint, courts decided the majority of cases in favor of education officials. Public schools and other government agencies were supported by the doctrine of sovereign immunity, a doctrine which held that a government entity could not be sued without its consent. A corresponding doctrine, charitable immunity, developed which was used by religious organizations as a defense against lawsuits; because of the charitable nature of the work of religious institutions, such an organization would ordinarily not be held liable for harm resulting from its negligence.

These two doctrines have now been generally abandoned in this country. However, charitable immunity helps to explain the belief of many persons associated with the Catholic Church

that people are not expected to sue the church and, if someone did, the church would win the lawsuit. Even today some persons voice the opinion that people are not likely to sue the church. This opinion is not supported by the facts. Persons no longer decline to sue a religious organization. Those responsible for religious education and youth ministry programs must understand that they have grave legal responsibilities. They must ensure that all persons, volunteer or paid, who work in such programs understand their basic legal responsibilities.

Constitutional Provisions

Everyone involved in the Catholic Church must understand that persons in religious settings do not enjoy the same rights that persons in public settings have. Persons in the public sector can claim Constitutional rights because the public sector is a government agency, and those who administer public sector operations are government agents. The Constitution protects persons from arbitrary governmental deprivation of their Constitutional freedoms.

Because the Catholic Church is not a governmental agency, employees, volunteers, students, and others do not possess the Constitutional protection that their public institutional counterparts do. These realities do not indicate that persons in the Catholic Church have no rights. They do have rights which are conferred by contract law, other statutory law, and/or common law considerations of fairness, not by the Constitution of the United States.

These restrictions may seem somewhat unfair, but a similar price is paid by anyone in a private institution. For example, if a person works in a supermarket, the employee may be required to wear a uniform, although the right to dress as one pleases is a protected First Amendment freedom of expression.

The bottom line is, that when one chooses to participate in a private activity, such as one operated by the Catholic Church,

one voluntarily surrenders the protection of the Constitution. Such an individual can always leave the church-sponsored activity, but so long as the person remains, Constitutional protection is not available. Thus, the Catholic Church and its programs do not have to accept behaviors that the public sector must accept and even protect.

Educational Rights and Requirements

Any discussion of the law affecting Catholic religious education and youth ministry programs must involve a consideration of the law concerning Catholic schools. In the past fifteen years or so, a body of case law regarding Catholic schools has developed. This case law will provide the basis for a theory of law affecting religious education/youth ministry in the Catholic Church.

The right of Catholic education to exist and of parents to send their children to Catholic educational programs was established by the 1925 United States Supreme Court's landmark decision in *Pierce v. Society of Sisters.* In this case an order of nuns challenged an Oregon law that would have required all children to attend public schools. The court stated the following:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public school teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations (p.535).

Obviously, if parents have a protected right to choose a religiously-affiliated school for their children, they have a right to choose other religious activities for them as well.

In order to understand what rights are protected in Catholic education and youth programs and what rights are not protected, a consideration of the rights of public school students

and teachers is helpful. These individuals are protected by the United States Constitution. The First Amendment guards the freedoms of speech, press and assembly; it further prevents government from promoting or interfering with religion (this doctrine is known as *separation of church and state).*

Of all the matters concerning rights and requirements which relate to education, the question of appropriate discipline is probably the most significant. Perhaps the most famous public school student discipline case was *Tinker v. Des Moines Independent School District, et al.*, which was decided in 1969. This case established the right of public school students to express themselves freely so long as such expression did not interfere with reasonable order in the school; the case also produced the famous statement, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the [public] schoolhouse gate" (p.506). The First and Fourteenth Amendments' protection was extended to young people facing suspension and/or expulsion. Since no such Constitutional protection exists concerning the Catholic Church and its programs and activities, directors and other administrators may restrict the speech of both students and teachers.

In 1974 two United States Supreme Court cases further delineated the rights laid down in *Tinker*. *Goss v. Lopez* required that students who were facing suspensions of ten days or less be given notice of the charges and opportunity to refute them. *Wood v. Strickland* (heard the same day as *Goss*) established the fact that, although students do not have an absolute right to a public education no matter what they do, they cannot be deprived of an education without procedural due process.

What Is Due Process?

Due process is a right guaranteed by the Fifth Amendment to the Constitution which requires that no one can be deprived of

life, liberty, or property "without due process of law." The Fourteenth Amendment made the Fifth Amendment applicable to the states.

There are two types of Constitutional due process: ***substantive due process*** and ***procedural due process***. In the public sector, people have rights to certain things. Substantive due process involves property interests (that which can be the subject of ownership, including jobs and education) and liberty interests (freedom and reputation). Substantive due process involves moral as well as legal ramifications: is this action fair and reasonable? Substantive due process applies whenever property or liberty interests can be shown.

If the government is going to deprive someone of a protected substantive right, ***procedural due process*** protection must be afforded that individual. The minimum protection is ***notice*** (the person is told what he or she did that is wrong and merits punishment) and a ***hearing*** (an opportunity to present his or her side of the story) before an ***impartial tribunal*** (an educator is considered a professional and an impartial person). In extreme cases such as student expulsion or teacher termination, the rest of the panoply of procedural due process protection may come into play: the right to confront one's accusers; the right to cross-examine; the right to be represented by an attorney; the right to a transcript of the proceeding; and the right to appeal.

There is no right to Constitutional due process in the private sector. There is, however, an expectation that people will treat others in a just and reasonable manner. Courts will not tolerate behavior that "shocks the conscience of the court." Thus, even though the Constitution does not apply in religious education and youth ministry programs, directors would be well-advised to ensure that rules have a rational basis and that participants are dealt with in a fair and equitable manner. The Golden Rule, "Do unto others as you would have them do unto you," is an excellent guide.

Although Catholic educational and youth programs are not

bound by these cases on Constitutional theories, there is a growing body of opinion that private institutions can be held to similar standards of conduct on either contractual or fair play grounds.

State Action

Before a private institution could be required to grant Constitutional protection to young people, the substantial presence of state action has to be demonstrated: the state is significantly involved (the court determines whether the involvement is significant) in the private institution or in the contested activity.

The only situation in which a Catholic program can be required to grant federal Constitutional protection occurs when state action can be found to be so pervasive within the contested activity that the church or its agents can fairly be said to be acting for an individual state. The key factor in state action is the nexus or relationship between the state and the challenged activity. Although litigants have alleged state action in Catholic schools, no court of record has found state action present in private school student or teacher dismissal cases.

In the 1970 case, *Bright v. Isenbarger*, dismissed students alleged that state action was present because of state regulation of the school and the school's tax-exempt status. Rejecting that claim, the court stated, "[B]ecause the state of Indiana was in no way involved in the challenged actions, defendants' expulsion of plaintiffs was not state action" (p.1395).

In the 1979 case, *Geraci v. St. Xavier High School*, a student and his father brought suit against a Catholic high school which had expelled the young man. The plaintiffs alleged the presence of state action. The court ruled that, even if state action were present, it would have to be so entwined with the contested activity (here, the dismissal of the student) that a symbiotic relationship could be held to exist between the state and the

dismissal of the student. If no such relationship can be demonstrated, state action is not present and Constitutional protection does not apply. This same court, however, was very clear in stating that Catholic institutions cannot do anything they wish since courts can intervene in disciplinary cases if "the proceedings do not comport with fundamental fairness." Fundamental fairness in a Catholic institution is akin to, but not synonymous with, Constitutional due process.

These cases indicate that, without a finding of significant state action in an educational program or activity, the courts will not hold the Catholic Church and its employees to the requirements of Constitutional due process. The case law should not be interpreted to mean that Catholic Church employees and volunteers do not have to answer to courts because of the absence of state action. Case law is constantly being developed, and so it is difficult to lay down definite rules. The fact that no case from the private sector involving the discipline of young people has ever reached the United States Supreme Court may mean that there has been no final ruling on state action in the non-public sector.

Since Catholic institutions and programs are not bound to grant Constitutional protection unless significant state action is found, litigants alleging a denial of Constitutional due process will have to prove the existence of significant state action within the institution before the court will grant relief. It is very important for directors of religious education programs and youth ministers to keep these facts in mind. It is not uncommon for persons to claim that their Constitutional rights have been violated in a program or activity sponsored by the church when, in fact, no Constitutional rights ever existed in the first place. These realities need to be clarified very early in a relationship between a religious education/youth ministry program and its staff, participants, and parents. One way to prevent possible misunderstandings is to develop and disseminate comprehensive handbooks which outline the rights and responsibilities of

all persons in the programs. (DREs and youth ministers may find the NCEA text, *School Handbooks* by this author, helpful in this regard.)

Laws Affecting the Church and Its Programs

The laws affecting education in the United States today can generally be classified according to four categories: (1) constitutional law (both state and federal); (2) statutes and regulations; (3) common law principles; and (4) contract law.

Federal Constitutional law protects individuals against the arbitrary deprivation of their Constitutional freedoms by government and government officials. Individuals in public agencies, such as public schools, are protected by Constitutional law, as discussed above, since public schools are governmental agencies and the administrators of public schools are public officials. Persons in private institutions are not protected by federal Constitutional law because they are private agencies.

Therefore, many actions which are prohibited in the public sector are permitted in the private sector and, hence, in religious education and youth ministry programs. For example, the First Amendment to the U.S. Constitution protects persons' rights to free speech; hence, public school administrators may not prohibit the expression of an unpopular political viewpoint. Since no such protection exists in the Catholic Church, officials can restrict speech.

Federal and state statutes and regulations govern the public sector and may govern the private sector as well. Failure to comply with reasonable regulations can result in the imposition of sanctions. The 1983 case of *Bob Jones v. United States* illustrates this point. When Bob Jones University was found to employ racially discriminatory admissions and disciplinary policies, the Internal Revenue Service withdrew the university's tax-

exempt status based on a 1970 regulation proscribing the granting of tax-exempt status to any institution which discriminates on the basis of race. Before a religious institution will be forced to comply with a law or regulation, the state must demonstrate a ***compelling interest*** in the enforcement of the regulations. ***Black's Law Dictionary*** (1979) defines compelling interest as: "Term used to uphold state action in the face of attack, grounded on Equal Protection or First Amendment rights because of serious need for such state action" (p.256).

In *Bob Jones,* the government's compelling interest in racial equality was sufficient for the court to order Bob Jones University to comply with the anti-discrimination regulation or lose its tax-exempt status. It should be apparent to directors of religious education and youth ministers that they play a very important role in ensuring that their parish stay within the requirements of discrimination legislation. Aside from the moral issues involved in discrimination, failure to comply with the legal requirements could conceivably result in a forfeiture of tax-exempt status. Loss of this status could well mean the loss of the ministry since most parishes would not be in a financial position to pay taxes on church property.

The town or city in which a parish is located has regulations. For example, a town might have a regulation prohibiting the use of electric lights on live Christmas trees. The director of religious education and the youth minister would be required to obey such a directive. Thus, it is their responsibility to research local statutes, since ignorance will not excuse failures to comply with the law.

The third type of law which applies to both the public and private sectors is the common law. Gatti and Gatti (1983) define common law:

> Common law is the general universal law of the land. This law is not derived from state STATUTES, but is developed through court decisions over hundreds of years. Common law prevails in England and in the United States and is the controlling law unless abrogated or modified by state or federal statutes. It

> should also be noted that common law may also be abrogated or modified by a constitutional amendment or decision by a higher court which adjudicates a constitutional issue. (p.89)

Common law principles may also be considered to be derived from God's law, especially by persons in church programs or activities. Many common law principles are founded in basic morality such as that contained in the Ten Commandments and in other religious writings.

Prior judicial decisions comprise an important part of common law. These decisions are often referred to as "precedents." When a lawsuit is begun, attorneys on both sides begin searching for precedents, prior cases that will support their arguments. In the United States these prior decisions can be found in courts of record dating from the beginnings of this country. The United States system of common law also embraces all English cases prior to the establishment of the United States. It is not unusual to find old English cases cited in modern cases.

The concept of fairness has developed in part from common law. It is a standard encompassing the expectation that reasonable people will treat each other in a manner that can be characterized as "fair."

The fourth type of law which governs both the public and the private sector is contract law. In a religious organization such as the Catholic Church, contract law is the predominant law governing participants and staff. A contract may be defined as: "An agreement between two or more persons which creates an obligation to do or not to do a particular thing" (Black, pp.291-92). The five basic elements of a contract are: (1) mutual assent (2) by legally competent parties for (3) consideration (4) to subject matter that is legal and (5) in a form of agreement that is legal.

Mutual assent implies that two parties entering into a contract agree to its provisions. A religious education program agrees to provide instruction to a participant, or a youth ministry program agrees to provide services and parents accept these offers.

Traditional contract law teaches that a contract will be considered legally binding only if there has been both an offer by the first party and an acceptance of the offer by the second party.

Legally competent parties implies that the parties entering into the contract are recognized by the law as competent to make the agreement. A religious education or youth ministry program, under the auspices of the Catholic Church, is legally qualified to enter into contracts. Parents are legally competent to enter into contracts benefiting their children; persons under the age of 18 are not legally competent, and so parents or legal guardians must sign contracts on their behalf.

Consideration is what the first party agrees to do for the other party in exchange for something from the second party. The religious education or youth ministry program agrees to provide services to a participant in return for obedience to rules and, possibly, for payment of a fee. To ensure the existence of a contract and the protection of contract law, officials should consider requiring the payment of some fee, even a minimal one.

Legal subject matter assumes that the provisions of the contract do not violate the law. An agreement, for example, that a participant would not associate with persons of another race would not be legal, as it would be a violation of anti-discrimination legislation.

Legal form may vary from state to state. Some states require, for example, that contracts be in writing.

Persons who believe that contractual rights have been violated can bring a lawsuit for breach of contract:

> A breach of contract occurs when a party does not perform that which he or she was under an absolute duty to perform and the circumstances are such that his or her failure was neither justified nor excused (Gatti and Gatti, 1983, p.124).

Breach of contract can be committed by either party to the contract (the program/administrator or the participant). Since a handbook is considered part of the contract, a program administrator can lessen allegations of breach by insuring that

there is a handbook which clearly delineates the rights and responsibilities of all—church officials, volunteers, participants, and parents.

It may appear unlikely that a parent would bring a lawsuit alleging breach of contract in a church program. However, the growing number of lawsuits brought against the Catholic Church indicates caution. It is better to be extremely careful and never need the fruits of that caution than not to develop policies, procedures, and documents and then find that they are needed.

Some Practical Advice

All religious education programs and youth ministry programs should develop clear rules governing participant behavior and clear procedures for dealing with violations of those rules. Such rules should be included in the handbook given to parents and participants.

Catholic educators and youth ministers must be concerned with witnessing to Christian moral standards; disciplinary policies and procedures must be examined in the light of Gospel principles and of the fundamental dignity that is the right of all persons. While recognizing that religious programs do not have to grant Constitutional protection, those who administer such programs would do well to consider this protection when developing their own rules.

The beginning point for rules' development should be the program's philosophy. Pastors, boards, and directors should ensure that there is a clearly-written philosophy that governs all the educational activities of the parish. The philosophy should be seen as a living document, not as something that was written once and then filed away. No staff member or volunteer should be allowed to begin work unless that individual has read the philosophy and agreed to support it. Parents and participants should understand, and be able to state, the philosophy. Even

a first grader should be able to see that one of the purposes of the program is to "learn about Jesus's love for us" or "to learn how to treat other people the way Jesus would."

If rules are clearly written, there is less likelihood that serious problems will arise when penalties are imposed. A rule stating, "Students are not to be late for CCD" could be considered vague; a rule stating, "Students arriving after the bell rings will be marked tardy," is much less open to debate.

Whenever possible, rules should be written. It is easier to display the written rule when emotions run high than to insist that "at the beginning of the program, you were told thus and such." Catch-all phrases, such as "other inappropriate conduct" should be added to a list of possible offenses, so that the program will be able to respond to inappropriate behavior that was not foreseen at the time the rules were written.

Every program should have some sort of parent/student handbook. If appropriate, religious education and youth ministry programs could have a joint handbook. Parents and older participants should sign a form stating that they have read the rules and agree to be governed by them. A written handbook should encourage the program to strive for clarity in rule-making. Periodic evaluation should enable the program to make necessary changes in the rules.

When considering the development of guidelines and procedures governing discipline, program directors must be aware that there is a time investment involved. If a participant accused of wrongdoing is given notice and a hearing, staff must take the time to tell the participants what it is he or she did that was wrong and also give the participant an opportunity to present his or her side of the story. The benefit of such an approach should be obvious: participants perceive authority figures as trying to be fair and may internalize the values that are modeled. If participants see educators behaving in a manner that is respectful of their dignity, they may be more likely to give that same respect to others. These values are of the utmost importance in

religious education and youth ministry programs where example may well be the most effective teacher.

Notes

Chapter Two

Tort Law: Responsibilities and Liabilities

If a director of religious education and/or a youth minister is sued, the probability is very high that the suit will allege commission of a tort, an injury resulting from a breach of the duty of care one person owes another. It may take one of several forms. *Black's Law Dictionary* states the following:

> It may be either (1) a direct invasion of some legal right of the individual; (2) the infraction of some public duty by which special damage accrues to the individual; (3) the violation of some private obligation by which like damage accrues to the individual (p.1335).

There are four main types of torts which could arise in the religious education/youth ministry setting: (1) negligence; (2) corporal punishment; (3) search and seizure; and (4) defamation.

Negligence

By far, the most often litigated case arising in educational settings is negligence. In determining whether negligence has occurred, courts will use a reasonable person's standard and ask, "What would a reasonable person in the defendant's position

have done in this situation?" Courts also rely on the principle, "The younger the child chronologically or mentally, the greater the standard of care." Ninth grade participants in religious education or youth ministry programs, for example, would ordinarily not require the same level of supervision that kindergarten students need.

Some people believe that children and older students can never be left unattended. Such a belief is mistaken. Courts recognize that emergencies can arise and that students might be left alone while the supervisor is taking care of the emergency. Courts expect, though, that supervisors will have told students at other points, such as the beginning of the term and periodically thereafter, what they are supposed to do if the supervisor has to leave. At minimum, rules might require that students remain in their places when the supervisor is not present. Program directors should consider developing a staff rule that students are not to be left unattended unless absolutely necessary, and that proper procedurtes are followed in the event of an emergency. Ordinarily, a staff person should be able to tell some other adult that he or she has to leave the students.

Religious education and youth ministry programs present many situations in which negligence could occur. It must be frankly stated that such programs present more legal risks than does the average classroom. Students are not in the ordinary classroom setting, and it may well be more difficult to ensure that students understand and abide by rules and regulations. In some programs in which volunteers are used for supervision, the supervising individual may not even know the students' names. He or she may not be skilled in teaching and classroom management techniques. Directors should insist that all persons who supervise participants participate in an orientation in which appropriate skills can be addressed.

Gatti and Gatti (1983) have defined negligence as the "unintentional doing or not doing of something which wrongfully causes injury to another" (p.246). It is important to note

that negligence is not intentional; a person with the best of motives can be negligent, and that situation can result in injury. Since negligence is an unintentional act which results in injury, a person charged with negligence is generally not going to face criminal charges. Persons who bring successful negligence suits are usually awarded financial damages in an amount calculated to compensate for the actual injury suffered. It is possible, though rare, for a court to award punitive or exemplary damages if the court is shocked by the negligent behavior. There are four elements which must be present before legal negligence can be found: ***duty, violation of duty, proximate cause***, and ***injury***.

The person charged with negligence must have had a duty in the situation. Church personnel are not responsible for injuries occurring at a place ***where*** or at a time ***when*** they had no responsibility. A youth minister, attending a university football game on his or her own time, does not have a legal duty to students who are also attending the game on their own time. Even if a student were injured while the youth minister were present, it would be difficult to establish any sort of ***legal*** duty on the part of the youth minister.

Within the religious education or youth ministry setting, participants have a right to safety, and staff and administrators have a duty to protect the safety of all those entrusted to their care. Personnel have a duty to provide reasonable supervision of young people. Directors have a duty to develop and implement rules and regulations guiding paid and volunteer staff in providing for safety.

One situation that presents many problems from a negligence standpoint is that of the participant who arrives early and/or is not picked up at dismissal time. All staff must understand that participants must be supervised from the time they arrive at the program location until the time they depart. If parents are late in picking up their children, an adult staff member must remain with the participants until the parents arrive. Directors may want to consider some sort of penalty for repeated violations of these

rules. Perhaps a fine could be imposed, or a participant could be denied participation in some social activity.

Whatever procedure a director chooses, at no time may a participant be left unattended or placed in front of a locked door to await the arrival of parents. Courts have indicated that administrators and staff members can be held responsible for participant behavior occurring on church property before or after programs and for the consequences of this behavior.

The school case of *Titus v. Lindberg* (1967) illustrates the extent to which administrators can be held liable. In *Titus* the principal was found negligent and responsible for student injury occurring on school grounds before school because: he knew that students arrived on the grounds before the doors were opened; he was present on the campus when they were; he had established no rules for student conduct outside the building, nor had he provided for student supervision. The court ruled that the principal had a reasonable duty to provide such supervision when he knew students were on the property before school.

It should be easy to see how a situation similar to that in *Titus* could arise in a religious education or youth ministry program. Who will supervise the early arrivals and the late pick-ups? This dilemma might well be taken to the supervising board for the development of a policy statement. Courts expect some policy or statement as to when students may arrive at a program site, what rules they are to follow, and what kind of supervision will be provided.

In any situation, common sense has to prevail. Textbook solutions are rarely available for persons working with young people. Gatti and Gatti (1983, p.246) state, "All people owe all other people the 'duty' of not subjecting them to an unreasonable risk or harm." This statement is especially true when adults are dealing with young persons entrusted to their care.

Negligence cannot exist if the second element, ***violation of duty,*** is not present. Courts understand that accidents and

spontaneous actions can occur. If a DRE is supervising a hallway between activities and one student picks up an object and throws it at another student and thus injures the student, the teacher cannot be held liable. The throwing of the object was a spontaneous action that could not have been anticipated by the teacher. If, however, the DRE were to allow throwing of objects in the hallway to continue without attempting to stop it and a student were injured, the DRE would probably be found to have violated a duty.

Similarly, a catechist who leaves a classroom unattended to make a personal, non-emergency telephone call will usually be found to have violated a duty if a student is injured and it can be shown that the instructor's presence could have prevented the injury. If it can be shown that instructors often left students unattended while the DRE, through inaction or inattention, did nothing about the situation, the DRE has violated a duty as well. Under the legal doctrine of ***respondeat superior*** (let the superior answer), administrators are often held responsible for the actions of subordinates.

The violation of duty must be the ***proximate cause*** of the injury. The court has to decide whether or not proper supervision could have prevented the injury and, in so deciding, the court has to look at the facts of each individual case. William Valente (1980, p.351) observed, "To be proximate, a cause need not be the immediate, or even the primary cause of injury, but it must be a ***material and substantial*** factor in producing the harm, 'but for' which the harm would not have occurred."

The tragic case of ***Levandoski v. Jackson City School District*** (1976) illustrates. A teacher failed to report that a thirteen year old girl was missing from class. The girl's body was later found some distance from the school. She had been brutally attacked and had died. The child's mother filed suit, alleging that if the girl's absence had been properly reported, the murder would not have happened. The court found no evidence proving a causal link between the violation of duty and the injury. Thus,

the case failed in proximate cause.

One can easily see how a slight change in facts could have produced a different outcome. Had the student been discovered on or near the school property, a court might well have found that proximate cause existed. It is not the act itself which results in legal negligence; it is the causal relationship between the act and the injury. If the relationship is too remote, legal negligence will not be found. Any reasonable person will try to be as careful as possible, of course, and not gamble on the "causal connection."

Religious education and youth ministry programs certainly have a high potential for these kinds of attendance problems. Directors must insist that accurate attendance be taken and that parents are notified as soon as possible if a student is absent or missing.

A well-known case which illustrates the concept of proximate cause is *Smith v. Archbishop of St. Louis* (1982). A second grade teacher kept a lighted candle on her desk every morning during the month of May. She gave no special instructions to the students regarding the dangers of lighted candles. One day a child, wearing a crepe paper costume for a school play, moved too close to the candle and the costume caught fire. The teacher had difficulty putting out the flames and the child sustained serious physical and psychological injuries.

The trial court ruled that the teacher was the proximate cause of the child's injuries. The court discussed the concept of *foreseeability*; it was not necessary that the defendant have foreseen the particular injury but only that a reasonable person should have foreseen that some injury was likely. Proximate cause is not direct causation. The teacher in *Smith* did not directly cause the child to be burned, but her action was a material and contributing factor in the injury. Staff members' negligence can be the proximate cause of a student's injury if they did not do the thing that would have prevented the injury or did do something (in *Smith* having a lighted candle near

children) that contributed to the injury.

The concept of foreseeability is important. Would a reasonable person foresee that there is a likelihood of injury? Religious education and youth ministry programs contain the potential for injuries like the one in *Smith*. Whenever possible, alternatives should be found to having open flames from candles. If lighted candles are used, extreme caution is in order. As the *Smith* court indicates, persons are expected to foresee that harm can result to students who are near candles and flames.

This discussion should indicate that proximate cause is an involved concept. It is difficult to predict what a court will determine to be the proximate cause in any particular allegation of negligence. Religious education and youth ministry programs pose special dangers because participants are not in the traditional school setting. Their energy can stimulate their taking risks that could expose them to dangers. Directors would be wise to hold regular staff meetings to discuss the program, instructors' expectations, and foreseeable problems. These matters can then be analyzed in the light of health and safety requirements.

Directors of religious education and youth ministers should realize that they can be held responsible for the actions of their staff members under the previously mentioned doctrine of *respondeat superior*, let the superior answer. In determining whether the superior is liable, courts pose questions such as these: has the superior developed a clear policy for staff conduct in dealing with situations such as the one which resulted in the participant injury? Has the supervisor implemented the policy? Are staff members supervised?

The fourth element necessary for a finding of negligence is *injury*. No matter how irresponsible the behavior of a teacher or administrator, there is no legal negligence if there is no injury. If a teacher leaves twenty first-graders unattended for thirty minutes and no one is injured, there is no negligence in a legal sense. In order to bring suit in a court of law, an individual has

to have sustained an injury for which the court can award a remedy.

In developing and implementing policies for supervision, the director of religious education or the youth minister must ask, "Is this what one would expect a reasonable person in a similar situation to do?" The best defense for an administrator in a negligence suit is a reasonable attempt to provide for the safety of all through appropriate rules and regulations. The best defense for a staff member is a reasonable effort to implement rules and regulations.

Because of the seriousness of the dangers posed by religious education and youth ministry programs, a greater standard of care will probably be expected of staff members than would be required of teachers in the traditional school setting. Directors and staff are expected to keep all equipment in working order and to render areas used by young people as free of hazards as is humanly possible, in keeping with the standards of reasonable people.

Thus, directors of religious education and youth ministers must take an offensive approach with regard to the elimination of hazards. All activities should be carefully monitored. All staff, paid and volunteer, should receive thorough and ongoing orientation and instruction. The reasonable religious education director or youth minister supervises staff. The supervisor who practices prevention by constantly striving to eliminate foreseeable risks will avoid costly lawsuits and participant injury.

Corporal Punishment

Corporal punishment has been a part of American culture from earliest times. It remains one of the most emotional topics in education today. Since the 1977 case of *Ingraham v. Wright* in which the Supreme Court ruled that public school students do not have Eighth Amendment protection against cruel and unusual punishment, states have been embroiled in controver-

sies concerning the use of corporal punishment in the public schools. The majority of states still permit corporal punishment in schools. Nonetheless, persons administering corporal punishment which results in student injury can be liable for the civil torts of assault (fear of bodily harm) and battery (an unwanted touching.)

Probably no director of religious education or youth minister supports the use of corporal punishment. It must be understood that corporal punishment is not simply hitting a person with some object. It has been construed by some courts as meaning any punitive touching. Pushing, shoving, pulling hair or limbs, slapping, ear boxing, *et cetera*, can be corporal punishment. A statement defining corporal punishment as any punitive touching and a policy forbidding it should be included in a staff handbook.

Realizing that an adult can lose control and impose inappropriate physical discipline, directors should implement a policy which requires a staff member to notify the director immediately if such an incident should happen and to file a written report which contains all pertinent details.

Search and Seizure

Search and seizure is a third kind of tort arising in educational settings. A 1985 case, *New Jersey v. T.L.O.* produced a U.S. Supreme Court ruling that public school officials need only reasonable, not probable, cause to search students. Catholic schools, religious education and youth ministry programs have no Constitutional restraints on the use of search and seizure. However, the Gospel certainly demands that everyone be respected and that unnecessary intrusions into persons and possessions be avoided.

Directors of religious education and youth ministers must realize that some situations require searches. If a young person is suspected of having weapons or drugs in his or her possession,

the DRE or youth minister will have to search. An adult staff member or volunteer should witness the search. Each program should have a search and seizure policy which is communicated to all involved. At minimum, a decision to search should involve some suspicion of wrongdoing on a young person's part. That individual should be asked to cooperate. If the person refuses, the parents should be contacted to come to the program site and assist in the search. If the parents do not cooperate, the director may impose a penalty, even exclusion from the program.

Defamation of Character

Defamation of character involves twin torts: slander, which is spoken, and libel, which is written. Defamation is an unprivileged communication; it is a statement made by one person about a second person to a third party who is not privileged to receive it.

Black's Law Dictionary (1979) defines a defamatory communication: "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him" (p.375).

Some people mistakenly believe that the truth is an absolute defense to defamation. Persons who work with young people are often held to a higher standard than is the average adult. In dealing with a person charged with defamation in the religious education or youth ministry setting, a court might well inquire as to the necessity for the communication. If the communication is unnecessary, even if true, the court could find the individual charged to be, in fact, guilty of defamation.

All staff members must be extremely prudent in any comments, oral or written, made about young people. Comments to parents should be about the parents' own children, not about other people's children. Communication should be made only to those persons who have a legitimate right to know.

Any documentation concerning young people must be both

accurate and protective of the rights of individuals whose behavior is being described. Records must be objective and factual. Communications should be measured against a standard that what is written be ***specific, behaviorally-oriented,*** and ***verifiable.*** It is better to say, "John has been tardy on four Sundays and absent on five," rather than "John's attendance record is poor." A statement such as, "Bob was a participant in three fights during the youth group picnic," is preferable to "Bob is a real troublemaker."

Religious education and youth ministry programs are not immune to tort suits. These programs involve special risks. The director needs to possess a working knowledge of the law as it affects programs offered by the Catholic Church. It is the director's responsibility to ensure that the staff is acquainted with all pertinent legal requirements and that policies for periodic review of procedures and ongoing supervision of staff are in place.

Notes

Chapter Three

Considerations Regarding Canon Law and Governance

All who work for the church in any capacity probably have some familiarity with civil law. Newspapers and television programs carry many reports concerning the numbers and types of lawsuits that are brought in this country daily.

There is a second type of law which impacts the lives and work of persons who minister in the Catholic Church, and that is canon law.

The Catholic Church and all its programs are governed by canon law, the law of the Catholic Church. Civil law respects canon law and recognizes the right of religious institutions to govern themselves. This right is not absolute, however. Civil courts will ordinarily not allow religious institutions to shirk legal responsibilities by invoking church law. Within the boundaries imposed by civil law, nonetheless, religious institutions and their programs have great autonomy.

The Diocesan Bishop's Role

Canon law controls both the existence and continuance of Catholic institutions. For example, a Catholic school can call

itself Catholic only with the approval of the bishop of the diocese. All Catholic schools, and all Catholic Church programs, are subject to the bishop in matters of faith and morals and in all other matters governed by the Code of Canon Law.

According to this code, the bishop is the only legislator in the diocese, and he has final responsibility for all laws in his diocese. He may, and probably does, delegate much of his power to other persons and structures in the diocese, but he can never delegate responsibility. In civil law the doctrine of *respondeat superior* requires that a superior answer for the actions of subordinates. Likewise in canon law, the bishop must answer for the actions of his designates.

Pastors as Heads of Juridic Persons

The canon law equivalent of the civil corporation is the juridic person, an individual legal entity recognized by the church. Religious education and youth ministry programs are part of the juridic person of a larger entity such as a parish.

The pastor is the chief authority in the parish in much the same way that the bishop is the chief authority in the diocese, and the pastor is subject only to the bishop. This is not to say that a pastor can rule over parishioners in such a way as to disregard their canonical rights; as specific protection of these rights, canon law even provides due process for all the People of God (Canon Law Society, 1983, #221). But, parishioners do not have any sort of majority vote by which they can override the decision of a pastor. It is important for everyone associated with the Catholic Church and its programs to understand that the Catholic Church is not a democracy.

While all the People of God share responsibility for the church's mission, the diocesan bishop has final responsibility for the diocese. In the same way, the pastor has final responsibility for the parish, subject to the bishops' periodic review.

Today the pastor shares his decision-making with many persons in the parish and may well operate in a spirit of collegiality. He stands alone, however, in a very real sense, under canon law, in his ultimate responsibility for the decisions that guide the life of his parish and hence, of all programs sponsored by the parish.

Most parishes today have advisory bodies such as parish councils, boards of education, and youth ministry councils. Except for financial councils, canon law does not *per se* require the formation of these bodies, but most bishops mandate them. Subject to the final approval of the pastor, these bodies are responsible for overseeing all aspects of parish life, including religious education and youth ministry programs.

Very often a Catholic parish school has its own school board, subject to the pastor and the parish council. Today, it is not uncommon to find, instead of a school board, a religious education board or a total education board. In the absence of an education board, the parish council may supervise the operation of youth ministry and/or religious education programs.

The text, *A Primer on Educational Governance in the Catholic Church,* authored by the Chief Administrators of Catholic Education and the National Association of Boards of Education of the NCEA, adopts two principle models for boards: consultative boards and boards with limited jurisdiction (CACE/NABE, 1987). In the past, terms such as advisory and policy-making have been used. An advisory board's function is to give advice; there is no obligation on the part of the one to whom it is given to follow that advice.

Types of Boards

A consultative board is one that is established by the pastor or by diocesan regulation. This board has responsibility for the development and/or approval of policies. The pastor has the

final authority to accept or reject the recommendations of the consultative board. This model works best when the pastor and the director of religious education and/or the youth minister are in regular attendance at meetings.

If the pastor or director consistently decides not to follow the decisions of the board, members could question the reason for the board's existence. Common sense and a spirit of collegiality would seem to require that the pastor and the director would accept the advice of the board, unless there were compelling reasons to not do so. Thus, the programs' best interests would be served if the board is able to use a consensus model of decision-making whenever possible. Consensus does not mean that everyone agrees that a certain decision is the best possible one; rather, consensus means that all members have agreed to support the decision for the sake of the program.

A board with limited jurisdiction, a second type of governance structure, is defined as one "constituted by the pastor to govern the parish education program, subject to certain decisions which are reserved to the pastor and the bishop" (CACE/NABE, p.27). This type of board has more autonomy in decision-making than would the consultative board because the pastor has delegated decision-making power to the board with limited jurisdiction. This board sets policies in certain areas. Although the pastor still retains veto power, the board with limited jurisdiction has decision- making power.

A third type of board structure may be found when two or more parishes join together to offer religious education and/or youth ministry programs. In effect, a regional religious education/youth ministry program is established. Different structures may govern the regional religious education program. Some are governed by boards with the pastors of all the participating parishes sitting on the boards and all board actions subject to the approval of those pastors; others are governed by boards subject to the final authority of one pastor designated as the one responsible for the program. The question of the

regional program as a juridic person or part of a juridic person is problematic. A program which is part of two or more parish juridic persons will face governance problems; if, however, the program were to become a separate juridic person, its relationship to the supporting parishes becomes complicated.

Whatever the governance structure, the program is subject to the authority of the bishop in matters of faith and morals. Canon law requires that the bishop exercise supervision over religious education programs and those who teach in them. All involved in the governance of programs must understand and accept the bishop's authority in these matters; to attempt to act in a manner contrary to the wishes of the bishop could place the program's continuance at risk.

According to canon law, all boards are consultative in a broad sense. No board in the Catholic Church has total jurisdiction over any aspect of parish life. Many consultative, or advisory boards, function like boards with limited jurisdiction. The present movement towards government by collegiality and consensus sometimes results in little, if any, formal, vote-taking; therefore, in practice, it is often difficult to distinguish between consultative boards and boards with limited jurisdiction.

Principles of Governance

Whatever the governance structure, canon law directs that two applicable principles guide the operation of the structure: subsidiarity and collegiality. Subsidiarity means that problems are solved at the lowest possible level. For example, a parent wishing to complain about a catechist would be directed to make that complaint first to the catechist; if resolution is not achieved, the parent would then approach the director. The board and the pastor should be approached only when all other attempts at resolution have failed.

Collegiality means that the contributions of all board members are valued. There is no place on a religious education board

for a "board within the board," a privileged group that makes decisions outside the board meeting and then maneuvers the rest of the board members into accepting those decisions at the board meeting. Although the pastor has veto power, when he is sitting as an *ex officio* board member, he should be treated as a board member and not as a privileged party. The same is true for religious education directors or youth ministers. Although they have serious responsibilities for the operation of the program, their opinions should not necessarily determine the direction of the program.

The Board's Role: Development of Policy

It is crucial that board members understand that power is vested in the board as a body, not in individual members. Board members must realize what the role of the board is—the development of policy. Even if policies are approved at a higher level, board members must perceive their role in terms of policy.

Policy is generally defined as a guide for discretionary action. Policy dictates *what* the board wishes to be done but is not concerned with administration or implementation; that is, the board should not become involved in *how* its directives will be implemented or *with* the specific persons who will implement them. For example, a board might adopt a policy requiring that all catechists and/or youth ministers participate in diocesan training sessions. The board should not be concerned with *which* individuals are assigned to teach or assist in youth ministry activities. Such questions are administrative ones. They are the day-to-day management choices of the director and/or youth minister. It is essential that all concerned understand these distinctions from the outset.

Generally, boards will set policies in the major areas of program, finance, and personnel. A board approves budget and

programs, sets staffing policies, and monitors programs, budget, and the implementation of polices. The director or youth minister would certainly suggest policies and would perhaps write the first draft of policies. The board approves these policies, the implementation of which is the director or youth minister's responsibility.

When differences of opinion arise, board members must keep their responsibilities to the parish, diocese, and Church in view. A board is not free to adopt a policy at variance with that of the diocese. If a board member cannot support a policy, that person should pursue change through the proper channels. All must realize, however, that ***support*** does not require ***agreement***, but it does connote a willingness to accept a decision and to refrain from criticizing it, once it has been reached and approved. If change cannot be achieved and a board member still cannot support the policy in question, then the person's only real choice is to resign from the board. The board member has to remember that the board's responsibilities are really twofold: (1) to develop policies and (2) to support the persons and activities that implement those policies.

Disagreements should be left in the board room. Board members must realize that, as individuals, they have no real power. The power is vested in the board acting as a body. Becoming involved in internal program conflicts only weakens the authority of both the board and the director/youth minister. The director and/or youth minister, however, should keep board members informed about problematic or potentially problematic situations so that board members will be able to respond in an intelligent manner if they are questioned.

Canon law governs all aspects of religious education and youth ministry programs. Thus, programs and boards supervising such programs have no authority to act outside the provisions of canon law. But within those provisions, boards have great freedom, so long as no civil laws are broken. Board members of Catholic religious education and youth ministry

programs have much greater latitude in the governance of their programs than do board members in the public sector.

Liability Concerns

Board members often have questions concerning their personal civil liability if someone were to sue the board. Historically, the previously mentioned doctrine of charitable immunity protected Catholic institutions and programs and those persons associated with them; this protection is, however, for all intents and purposes, not available in modern courts.

Some states have passed laws which specifically protect members serving on boards of non-profit organizations, such as religious institutions and their programs, from civil liability. These laws presume *good faith* on the part of the board member; that is, a person is expected to act in the best interests of those served. Good faith is a traditional defense to most claims against board members in the public and private sectors. It must be openly stated, however, that plaintiffs often allege bad faith in an attempt to defeat the defense. If bad faith is proven, the board member will probably not be immune from liability. Further, these laws granting immunity could be struck down by courts on a public policy theory: that is, public policy demands that individuals retain their rights to seek remedies for wrongs and that the state not pass laws that restrict those rights.

Board members must understand that they may be held personally liable if they knew or should have known that a certain policy violated a person's rights. In these days of increasing litigation, board members need liability insurance. As a matter of justice, dioceses and parishes should obtain and fund such protection for persons serving on boards. If this protection is not available, board members should consider obtaining their own coverage.

Board members cannot presume that they have absolute immunity from liability. The best protection from a lawsuit is

the effort to act always in accordance with justice. Board members should be offered some in-service education concerning the legal aspects of board membership. To this end the diocesan attorney should provide information concerning the laws of a given state and offer appropriate advice when questions concerning legal aspects arise. (Although written for board members of Catholic schools, the 1988 NCEA text, *A Primer on School Law: A Guide for Board Members in Catholic Schools* by this author, may be helpful.)

The DRE/Youth Minister and the School Principal

Many religious education and youth ministry programs "coexist" with parish school programs. The religious education and youth ministry programs often use school classrooms and other school space for their meetings. Sharing of facilities can prove problematic under the best of circumstances, as the "home" group may object to chairs being left out of order or to student belongings being rearranged. The "visiting" group may object to a perceived proprietary posture on the part of the principal, school staff, and students. Certainly, it is to everyone's advantage if the administrators of the parish school and the religious education and/or youth ministry programs can work together. Since all persons in positions of parish leadership belong to the same *staff* and espouse a common mission statement, problems concerning externals should not provide major difficulties.

A board of total Catholic education/formation, encompassing all education programs in the parish, is one approach to solving the dichotomy that may exist when there is a separate school board. A board of total Catholic education/formation would oversee the operation of all programs and should be able to facilitate communication and sharing of facilities. Such a board would report to the parish council as well as to the pastor.

Whatever the governance arrangement, religious education directors and youth ministers should strive to work with school principals. The working relationship should be characterized by mutual respect and support. The principal should be publicly and privately supportive of all parish programs not directly sponsored by the school. For example, if the religious education program requires that students preparing for First Communion or Confirmation participate in some activity, the principal should support that requirement. At the same time, the DRE and/or youth minister should support the principal and the rules and regulations of the school. When participants, parents, and staff see mutually supportive educational enterprises within a parish, everyone benefits, and the basic purpose of Catholic life, the promotion of the reign of God, takes place.

Notes

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Chapter Four

Directors, Staff, and Volunteers: Rights and Duties

Directors of religious education and youth ministers have the basic legal right to administer programs. No one should interfere with that prerogative lightly. The director/youth minister is entitled to the support of the bishop, the pastor, the parish council, and the board. If, for serious reasons, any one or more of those parties cannot support the director/youth minister and an acceptable compromise cannot be reached, someone may have to leave the situation. In any event, parties have the obligation to support one another publicly and to address differences in the appropriate forum.

DREs and youth ministers have numerous responsibilities, many of which are not found in any document. The safest course of action might be for a DRE or youth minister to assume responsibility for the entire program. Like the bishop and the pastor, the DRE/youth minister may delegate decision-making powers to other persons, but the responsibility cannot be delegated. If a lawsuit is brought against a parish because of something that happened during religious education or youth ministry, it is extremely likely that the director will be sued as well.

A director has two main legal responsibilities: (1) policy

formation and communication of rules and policies and (2) supervision of staff and other personnel. Almost every activity a DRE/youth minister does fits under one of these two categories.

Even though parish councils, youth ministry commissions, boards of religious education, and pastors may have the final responsibility for approving policy, the DRE/youth minister plays an essential role in developing it. The best models for policy development are ones that either (1) have the DRE/youth minister write the first draft of the policy and bring it to the council, board, or committee for discussion and revision or (2) have the DRE/youth minister serve as a member of a committee which develops policy in a given area or areas. It is important that both pastor and council/board recognize the DRE/youth minister as the program expert and utilize that expertise to the fullest extent possible. Once a policy is adopted, DREs/youth ministers communicate it and provide for its implementation.

One of the DRE/youth minister's most serious responsibilities is the supervision of staff. It is crucial that everyone understand that supervision and evaluation of personnel are the DRE/youth minister's responsibility. DREs/youth ministers are supposed to ensure that the best possible experience is given to young people. In reality, supervision is quality control for the program and parish.

Supervision of personnel is not simply a determination that persons are performing their jobs in an acceptable manner. It is also legal protection for personnel. If personnel are not supervised and allegations are made against an individual, the DRE/youth minister will have no evidence to use in support of the individual. If a staff member is faced with a lawsuit, the DRE/youth minister is the person best equipped to assist the individual in refuting the charges. The DRE/youth minister's supervisory data will provide the necessary evidence.

Volunteers expose themselves to liability by the very act of

accepting responsibility. They deserve as much help and protection as directors can possibly give.

Volunteers often have no training and no experience in the supervision of young people. Directors must provide orientation and ongoing support for all staff. At least minimal instruction should be offered in these areas: classroom and/or group management and discipline; lesson planning, where appropriate; and child/adolescent psychology. Volunteers and paid staff also need to understand basic safety and first aid procedures. A well-planned orientation and periodic updating will help to ensure that staff are as well-prepared as possible to meet the demands of ministry to young people.

Duties and Rights of Staff

Staff have two main legal duties. The first is to implement rules. Staff members do not have to agree with every rule and regulation, but they do have to support and implement them. A staff member is certainly free to disagree with a rule, to express that disagreement to persons in authority, and to seek change through appropriate channels. The staff member is not free to choose not to enforce the rule or to express disagreement to young people. Much harm to programs and to youth is sustained when staff do not enforce rules and/or do not support authority.

The staff member's second duty is to supervise young people. Supervision is both a mental and a physical act. It is not sufficient to be present physically; one must be present mentally as well. Staff must be sure that their full attention is on young people. Two staff members might be supervising a bus trip, for example, and be so engrossed in conversation with each other that they do not notice two young persons misbehaving. If the misbehavior results in injury to a young person, the staff member may be held to have violated the duty to supervise, even though he or she was physically present when the injury occurred.

Just as the rights of young people in religious education and youth ministry programs are somewhat limited, so are the rights of personnel, paid and volunteer, who work with them. As discussed earlier in this text, the protection of the U.S. Constitution does not apply.

Nonetheless, personnel do have rights. These are generally conferred by the contract or agreement existing between the parish and the staff member, and so the law of contracts governs the employment situation. State statutes may confer other rights. Additionally, persons may be said to hold rights under the common law standard of fair play. What may seem to be a principle of fair play to one individual may not seem so to another. One director may consider it immoral to dismiss a staff member for freely speaking about administrative practice; another director may deem dismissing a person for such a reason as perfectly acceptable and, indeed, courts have upheld such dismissals. Any anticipated action should be judged in the light of fairness. Common law demands that persons treat other persons according to certain accepted standards of behavior. If one were to try to compile a listing of personnel rights in Catholic institutions, one could look to the common law standards of fairness.

Volunteers

If a person truly volunteers services, there is no contract existing between that individual and the institution. For a contract to exist, there must be *consideration*—each party must give up something and each party must receive something. Since a volunteer is not paid, there is no consideration and, hence, no contract.

From a strictly legal standpoint, a volunteer has no rights to a position. Volunteers can be dismissed with no repercussions. However, any DRE or youth minister who is truly seeking to follow Jesus and his Gospel will surely want to be fair in dealings

with all people, including and, especially, volunteers.

Related Personnel Issues

The last few decades have been times of great change for the Catholic Church. In less than thirty years, the majority of employees in Catholic institutions has shifted from clergy and members of religious congregations to lay persons. Catholic institutions have had to confront the issues of paying appropriate salaries to employees, providing some sort of employee benefits, and developing legally sound policies and procedures.

These issues have compelled church officials to examine the legal soundness of actions and documents. Constraints must be balanced against the requirements of justice. One of those constraints is civil law, a parameter inside which the church operates. If the church moves outside the parameter, everything in it can be diminished. Disagreements between personnel and church officials cannot always be solved in the pastor's study. Some difficulties are taken to court for resolution.

Civil courts have great respect for organized religion and its internal laws. Canon law governs the existence of Catholic institutions and their relationships with various persons and institutions within the church.

The Revised Code of Canon Law calls for subsidiarity and collegiality in relationships and structures within the church. Subsidiarity requires that persons having disagreements or complaints should seek discussion and resolution of the problem at the level closest to the problem. If this procedure becomes standard practice in the Catholic Church, an untold number of problems could be solved before major crises develop and lawsuits are filed.

Bishops, pastors, and other administrators will usually be upheld if challenged in a court because of the First Amendment's protection of freedom of religion. This protection is not absolute, however. The 1982 case of *Reardon v. LeMoyne,* involving

four women religious in conflict with the diocese, illustrates this point. This case represents the first time a group of Catholic religious women brought legal action against church officials in a civil court. The New Hampshire Supreme Court found that the doctrine of separation of church and state did not preclude jurisdiction in non-doctrinal contract matters:

> Religious entities, however, are not totally immune from responsibility under civil law. In religious controversies involving property or contractual rights outside the doctrinal realm, a court may accept jurisdiction and render a decision without violating the first amendment....It is clear from the foregoing discussion that civil courts are permitted to consider the validity of non-doctrinal contractual claims which are raised by parties to contracts with religious entities. This requires the courts to evaluate the pertinent contractual provisions and intrinsic evidence to determine whether any violations of the contract have occurred, and to order appropriate remedies, if necessary (pp.431-32).

In essence, the court found that trial courts can exercise jurisdiction over church officials in civil employment matters.

Employment Policies

Dioceses and parishes are responsible for developing policies that protect the contractual rights of salaried personnel. Contracts place certain obligations upon employees, but they also place obligations upon the employer. It is important that the parish's policies be in line with those of the diocese, especially in view of the fact that most church contracts bind employees to observe the policies and regulations of the diocese.

Policies become extremely important in the area of hiring procedures which must meet the requirements of civil law. Pre-employment inquiries, in particular, carry the potential for violation of a person's rights. Employers want to gather as much job-related information as possible, but at the same time invasion of privacy must be avoided. There are at least four areas of

impermissible inquiries, first outlined by Horton and Corcoran: (1) questions concerning marital status and the family situation; (2) questions which are not job-related, regarding personal history; (3) questions concerning associational activities; and (4) questions regarding irrelevant educational and work history. It should be noted, however, that questions which are impermissible before employment may be asked after employment when discrimination is no longer a threat to hiring.

Job-related questions are allowed; some examples might be, "Is there any condition or situation that might cause you to have a problem with regular attendance?" or "Are you a Catholic in good standing with the Church?" Another approach would be to have an optional section on the employment application; this section could ask marital status and numbers and ages of children, but the person could choose not to answer it.

Questions regarding arrests and criminal records must be worded carefully. A person may have been arrested but never convicted. Many attorneys recommend a question such as, "Have you ever been convicted of a crime involving moral turpitude?" Some examples could be given, such as rape, murder, and felony convictions involving injuries of any kind to another person. If a person answers "yes" to such a question, that individual should be asked to provide the details. It is advisable to state that conviction of a crime is not an automatic bar to employment and that the hiring officials will consider the nature of the offense and the connection between that offense and the position sought.

Applicants, both paid and volunteer, should be asked to sign a statement giving permission for background checks. Many states now have laws requiring all persons who work in schools to be fingerprinted and the fingerprints checked against records of criminals convicted of felonies. Directors of religious education and youth ministers should give serious consideration to fingerprinting and conducting background checks on all personnel, paid and volunteer. Unfortunately, it is not uncommon

for pedophiles or other undesirable individuals to volunteer to work in parish programs in order to have access to young persons.

Directors of religious education and youth ministers have grave responsibilities in the administration of their programs. Adherence to both civil law and Gospel mandates will help to ensure that the rights of all are protected.

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Chapter Five

Some Key Questions and Concerns

This concluding chapter will attempt to examine some key areas of concern and to offer some strategies for dealing with those key areas.

Supervision of Young People

As stated earlier in this text, one of the major concerns of DREs and youth ministers must be supervision of young persons entrusted to their care. That supervision can, and often does, extend to times and places outside the normal program times.

The problem of young people present in parish buildings and/or on the grounds without adult supervision presents a lawsuit waiting to happen. Court decisions indicate that religious institutions can be held responsible for accidents and injuries occurring on church property before and after activities. Some programs have a policy stating that participants are not to arrive before a specified time and are to leave by a certain time, but it is a policy or rule that is often not enforced. No one wants to be insensitive to the problems of parents; however, it is not fair to assume that it is permissible to drop young persons off at the parish center or school building very early and/or to pick

them up long after the program ends. Nonetheless, young people cannot be left unattended. Policies and procedures for dealing with early arrivals should be in place. A staff member must remain until the last participant has left.

There are several possible approaches to this supervision problem. One is to post "no trespassing" signs and to enforce a policy of no presence on parish grounds outside specified times. If a participant is present at a time when no supervision is provided, the parents should be notified if, of course, this presence is observed by one in authority. Appropriate warnings and penalties should be given. The parish council or education board might want to consider a policy that would require parents to withdraw a child from the program after repeated offenses.

Another approach would be for the parish council or education board to appropriate funds to pay a responsible adult to supervise an hour before and an hour after programs. There are, of course, other options; the point is to do something. No one should take refuge in the belief that since nothing dangerous has ever happened, nothing ever will happen. A single accident or death and resulting lawsuit could be both tragic and costly and perhaps could be avoided if policies and procedures were developed and enforced.

Another area of potential liability is off-grounds trips. First, staff should understand that there is no inherent right to participate in such a trip. The staff can refuse participation to participants whose conduct is less than satisfactory. Directors must understand that attendance at off campus activities cannot be compelled; parents have a right to refuse to allow participants to participate.

Parents should sign permission slips for all trips off parish grounds. The first sentence of the slip should read, "I, We, the parent(s) of _____, request that our child be allowed to participate in (name the activity.)" The next sentence should give permission. Remaining sentences should release the

parish and its staff from liability in the event of injury. The permission slip should also state the mode of transportation; whenever possible, buses should be used. If private cars are used, that fact should be noted on the permission slip. It is highly advisable that a standard permission slip, previously reviewed by the parish or diocesan attorney, be used for all religious education and youth ministry trips.

Staff must understand that a permission slip is not absolute protection from a lawsuit. Courts and insurance companies expect that staff will act in a reasonable manner and will protect young persons from harm as much as possible.

Child Abuse and Neglect Reporting

The failure to report suspected child abuse and/or neglect is a special kind of negligence. Every state has laws mandating that persons who work with children and young people report suspected abuse and neglect. Persons who fail to report can incur both civil and criminal penalties.

Many law enforcement officials advise reporting everything a child or young person says that could constitute neglect or abuse. These officials caution against making personal decisions about what is and what is not abuse; police departments and social agencies are charged with that task.

Deciding to report is never easy. Staff members who have suspicions should discuss these immediately with their supervisors. Some programs follow a policy which requires the director of religious education or the youth minister to make the report. This is an acceptable procedure and allows the staff person to achieve some emotional distance from the situation. Staff members must understand that, if for some reason, a director or youth minister refuses to make a report and the staff member sincerely suspects abuse, that individual is legally obligated to report. The laws of most states protect persons who make "good faith" reports, even if these reports later prove to be unfounded.

The DRE and/or youth minister should include education about child abuse and reporting laws in orientation of new staff members.

Copyright Law Considerations

A final area of consideration is copyright law. The technological advances of the past few years have resulted in much greater copying capabilities. With these developments comes a greater risk of violation of the copyright law.

Most people realize that there are laws governing the copying of articles, books, computer programs, cassette tapes, and videotapes. For some individuals, the fact that few people who break the copyright law are prosecuted becomes a license to transgress the law. For others, the motive of helping persons in need is an excuse for failure to comply with the law.

In the 1970s religious music publishing houses instituted legal action against Catholic churches that were copying sheet music and compiling their own song books. The court determined that such practices were illegal. Some publishing houses thereafter offered yearly contracts to parishes and other religious institutions: for a given sum of money, the institution could make as many copies of songs as desired during the span of the contract. Despite the lawsuits and their outcome, there are still individuals within the ministry of the Catholic Church who attempt to evade the copyright law.

It may be tempting to think that copyright infringements and lawsuits are the exclusive domain of large institutions. Obviously, if a company is going to sue, it will seek a person or institution that has been guilty of multiple infringements so that larger damages can be won. It simply does not make good economic sense to sue someone who will be ordered to pay only a small amount of damages.

Sometimes, though, lawsuits are brought solely to prove a point. In the 1983 case, *Marcus v. Rowley*, two public school

teachers were the litigants. One teacher had prepared a booklet for class use; the second teacher copied approximately half the pages and included them in her teaching materials. The amount of money involved was very small. Nonetheless, the court found the second teacher guilty of copyright violation; her use of the other's materials was not fair.

Section 107 of the 1976 Copyright Act deals with "fair use" and specifically states that the fair use of copies in teaching "is not an infringement of copyright." The "sticking point" is what the term "fair use" means. The section lists four factors to be included in any determination of fair use:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copy-righted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

Religious education and youth ministry staff should have little or no difficulty complying with the "purpose and character of the work" factor. Staff generally copy materials to aid the educational process. It should be noted, however, that recreational use of copied materials, such as videocassettes or computer games, is generally not allowed under the statute.

"The nature of the copyrighted work" factor can prove a bit more problematic than "character and purpose of the work." Who determines what is the "nature of the work"—the creator and/or copyright holder, the user, the judge, or the jury? Almost any material can be considered educational in some context. A court, however, looks to the ordinary use of the work and to the author's intent in creating the work.

The "amount and substantiality" of the work copied is especially troublesome in the use of videocassettes and computer programs. Persons understand that they are not supposed to copy a whole book, but they may not understand that copying

a television program or a movie onto videotape or copying a computer program for participant use can violate the "amount and substantiality" factor. A relatively new practice, developing libraries of copies, is emerging in some schools and religious education programs. Whether the collections are copies of print materials or non-print materials, such as videotapes and computer programs, the practice of building collections will generally not be allowed under copyright law.

The last of the four factors, "effect on the market," is also difficult to apply in parishes. Arguments can be advanced that young people would not rent or purchase commercially available items, even if the copies were not available. It appears that the use of an author's work without appropriate payment for the privilege is a form of economic harm. Good faith will not operate as an acceptable defense in many copyright cases.

A Congressional committee developed "Guidelines for Classroom Copying in Not-for-Profit Educational Institutions." Every DRE and youth minister should ensure that staff members have access to copies of the guidelines which are readily available from local libraries, the United States Copyright Office, and members of Congress. Although these guidelines do not have the force of law that the copyright statutes have, judges have used them in deciding cases. Some examples of the guidelines follow.

For poetry, copying of a complete poem of less than 250 words printed on no more than two pages or of an excerpt of 250 words from a longer poem, is allowed. For prose, a complete work of less than 2500 words or an excerpt from a longer work of not more than 1,000 words or 10% of the work, is permitted. The guidelines mandate that copying meet this test of *brevity*.

The copying must be *spontaneous*; the staff member must have decided more or less on the spur of the moment to use an item. Spontaneity presumes that an individual did not have time to secure permission to use from the copyright holder. A catechist who decides in September to use certain materials in

December has ample time to seek permission; failure to seek permission means that the spontaneity requirement will not be met.

The last requirement is that the copying must not have a ***cumulative effect.*** Making copies of poems by one author would have a cumulative effect and would mean that collected works of the author would not be bought. Similarly, building video or cassette collections of programs is not permitted. Copying computer programs is never advisable, unless permission to make copies is included in the purchase or rental agreement.

Videotapes may be kept for forty-five days only. During the first ten days, a teacher may use the tape once in a class and once more, if needed, for review. For the remaining thirty-five days teachers may use the tape for evaluative purposes only.

Directors of religious education and youth ministers are responsible for compliance with copyright law. If a staff member is charged with copyright violation, it is likely that the DRE or youth minister will be charged as well. Clear policies and careful monitoring of those policies can lessen liability. Copyright violation is stealing. "Thou shalt not steal" is still good law.

Finally, and in keeping with the scriptural injunction to avoid stealing, staff members in Catholic institutions will surely support Jesus' reminder in Luke 10:7 that the worker deserves appropriate wages. Clearly, excessive copying of print or non-print materials deprives authors, artists, musicians, ***et al.***, of sales and royalties on which they depend for a livelihood. Failures by Catholic DREs/youth ministers to respect these rights would directly contradict their duty to form by personal example, the first obligation of every staff member in an institution professing to be part of the faith community founded by Jesus Christ as the realm of God on earth.

A Final Thought

Despite well-intentioned efforts by staff members to discharge these lofty duties appropriately, lawsuits involving Catholic institutions increase steadily. Study of the law, as it pertains to ministry, is a necessary task. Jesus said, "Suffer the little children to come unto me," but Jesus also requires justice for all persons, including and especially, those unable to protect themselves. Surely Jesus would expect those who minister in his name to be faithful both to the Gospel and to civil law.

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Mary Angela Shaughnessy, SCN does a great job in orienting DREs and Youth Ministers to the complexity of the law. She reminds us that we "may delegate decision-making powers to others, but the responsibility cannot be delegated." While she relies on legal examples from classroom settings rather than the other sites of youth ministry, her illustrations are clear and to the point. Her book is easy to read and addresses critical areas which ministers need to face but are reluctant to. This resource is an easy way to overcome that reluctance.

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